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No. 85-1262

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TEXAS ASSOCIATION OF CONCERNED TAXPAYERS, INC.,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY TO THE UNITED STATES MEMORANDUM IN OPPOSITION

RONALD A. ZUMBRUN
SAM KAZMAN *
PACIFIC LEGAL FOUNDATION
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686
Attorneys for Petitioner

* *Counsel of Record*

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It is rare that the party opposing certiorari takes greater issue with the decision it is defending than with the petition it is attacking. This, however, is precisely what the United States does in its Memorandum in Opposition (Opp.). In the brief span of five pages, the government not only avoids responding to nearly every substantive argument raised in the Petition for Certiorari (Pet.), it also directly contradicts the decision below on two major points:

1. The government claims that the "central theme" of this case is that TEFRA [1] did not originate in the House

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[1] The Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982).

of Representatives (Opp. at 3), implying that the petitioner is challenging the validity of the House Clerk's certification of the bill's origin. This is a straw-man issue which was specifically disclaimed ("The issue in this case is not *where* TEFRA originated, but what it originated *as*." Pet. at 21 n.11 (emphasis in original)) and which the Fifth Circuit expressly stated was not present in the case: "TACT does *not* claim that the bill that became TEFRA did not originate in the House of Representatives." Decision below, 772 F.2d 163, 165, Appendix to Petition (App.) at A3 (emphasis added). As the Fifth Circuit recognized, the issue before it was whether a measure to reduce taxes, which is what TEFRA originated as, constitutes a bill for raising revenue under the Origination Clause of the Constitution, Art. I, § 7, cl. 1.

2. The government also claims that TEFRA's validity "follow[s] from this Court's decision in *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911)." Opp. at 5. The only Origination Clause issue present in *Flint*, however, was whether the Senate could take one House-initiated tax increase and replace it with another. This is solely a question of the Senate's power to amend. Since there was a House-initiated tax increase to begin with in *Flint*, the Supreme Court did not have to decide the applicability of the clause to tax-reduction measures, and that case has no bearing on this question.[2] In the words of the

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[2] The *Flint* decision is thus a straightforward application of the "principle frequently applied . . . that the Senate may substitute one kind of tax for a tax that the House has proposed, *but may not impose a tax if one had not originally been proposed by the House.*" 3 *Deschler's Precedents of the United States House of Representatives* 314 (1977) (emphasis added).

The government suggests that in *Flint* this Court rejected any comparison between the revenue effects of the original and enacted bills; according to it, "the Court found unpersuasive the argument that the Senate measure . . . was likely to raise total taxes to a greater extent than the proposed House bill." Opp. at 5. The gov-

Fifth Circuit, "[i]n *Flint* [unlike the instant case] interpretation of the terms of the clause was *not* at issue." 772 F.2d at 167, App. at A9 (emphasis added).

By attempting to use *Flint* as support for the Fifth Circuit's decision despite that court's clear language to the contrary, the government ignores both the facts of the former case and the language of the latter.[3]

* * * * *

Unlike the contents of the Fifth Circuit's decision, the substantive arguments of the petition are not misstated by the government in its opposition; instead, they are almost totally ignored. The government characterizes four TEFRA cases from other circuits as "completely dispos[ing] of petitioner's claim for relief." Opp. at 3. Only one of the these cases, however, *Armstrong v. United States*, 759 F.2d 1378 (9th Cir. 1985), contains any considered treatment of TEFRA's validity on the merits; the rest simply dispose of the issue in one or two unsupported sentences.[4]

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ernment's point is gratuitous in light of the above, since there was a House-initiated tax increase *ab initio* in *Flint*—a crucial feature whose *absence* in the case of TEFRA is the crux of the instant litigation. Moreover, the argument itself, for which the government provides no citation, appears nowhere in the body of the *Flint* decision.

[3] What *is* noteworthy about *Flint* is the position taken in that case by the United States. The government there argued that the Court could go *beyond* the Clerk's certification of origination and determine in which chamber the *final*, rather than original, version of an enacted bill was first developed and voted upon. Supplemental Brief for the United States at 5, *Flint*; reprinted in the Appendix to this Reply at 1a, 3a. Under this approach (which the petitioner has not itself advocated) TEFRA would surely be viewed as originating in the Senate, since that chamber was the source of nearly all of the final features of the enacted bill. *See, e.g.*, 772 F.2d at 164-65, App. at A3.

[4] Or they simply cite to other cases which do no better. *See* Pet. at 9 n.5, 24 n.12.

As was pointed out in the petition, there are two major flaws in *Armstrong's* fundamental holding that "the Senate has never regarded itself as being empowered to initiate any sort of revenue bill, even one that lowers taxes" (759 F.2d at 1381)—(1) it is simply wrong as a matter of history, and (2) it is contradicted by the very congressional precedent that it relies on. *See* Pet. at 14-16 (listing over a dozen instances in which the Senate originated bills to repeal or reduce taxes) and at 24 (noting that 2 *Hinds' Precedents of the House of Representatives* § 1489 at 952 (1907), which is cited in *Armstrong*, expressly states that a bill to repeal a tax is *not* a revenue-raising bill and may originate in the Senate; it thus contradicts the very point for which it is cited—namely, "that *all* legislation relating to taxes . . . must be initiated in the House." 759 F.2d at 1381 (emphasis in original)).

These arguments are brushed aside by the government as dealing with "pre-Civil War enactments" whose significance in construing the Constitution pales in comparison to "modern congressional practice." Opp. at 4 n.1. It should be noted first of all that "modern congressional practice" itself does little to validate TEFRA. *See, e.g.*, Pet. at 13-14 (contradictory interpretations of the Origination Clause by the same House Ways and Means Committee Chairman).[5] More importantly, given

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[5] As for the *post*-Civil War Senate-initiated tax measures cited in the petition, the government claims that these are all "incidental provisions in bills intended primarily for other purposes . . . ." Opp. at 4 n.1. The government aspires to be a better judge of congressional purpose than Congress itself; how else could it characterize as *incidental* the tax effects of a Senate-originated act such as Pub. L. No. 82-493, 66 Stat. 518 (S. 2605) (1952) (Pet. at 17 n.8), which Congress itself titled "An Act to amend certain tax laws applicable to the District of Columbia"? This approach well illustrates the observation in *Hubbard v. Lowe*, 226 F. 135 (S.D.N.Y. 1915), *appeal dismissed*, 242 U.S. 654 (1916), that "it has sometimes required a good deal of mental strain to demonstrate that some piece of legislation originating in a Senate was not a 'bill for raising revenue.'" 226 F. at 140.

the vintage of the Constitution itself, reading that document through the historical blinders suggested by the government is singularly inappropriate. *See, e.g., Myers v. United States*, 272 U.S. 52, 174-75 (1926) (actions of the first Congress are entitled to "the greatest weight in the interpretation" of the Constitution).

Most conspicuously absent from the government's brief, as it is absent from all of the decisions on TEFRA, is any hint of what meaning is left to the Origination Clause if this act is upheld. The excerpts from the debates of the Framers presented in the petition clearly indicate that their purpose was to restrain tax increases, not tax reductions. They did so by placing the unwelcome responsibility for originating such measures on the more politically vulnerable chamber of Congress. That purpose is obviously destroyed if the clause is read to permit TEFRA's enactment. It would be one thing if the government had presented some other historical evidence indicating a different intent by the Framers; instead, it utters not one word as to just what that clause might mean under its approach.

If one of the few constitutional limitations on the taxation power is to be rendered meaningless, it should be on the basis of something more persuasive than the silence offered by the government, or the cloak of nonjusticiability set forth in the decision below. For this reason, and for other reasons presented in the petition, a writ of certiorari should issue in this case.

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Respectfully submitted,

RONALD A. ZUMBRUN
SAM KAZMAN *
PACIFIC LEGAL FOUNDATION
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686
Attorneys for Petitioner

* *Counsel of Record*